ORIGINAL

BEFORE THE

SURFACE TRANSPORTATION BOARD

204747

FINANCE DOCKET NO. 34052

GREEN MOUNTAIN RAILROAD CORPORATION – PETITION FOR DECLARATORY ORDER

SUPPLEMENTAL PETITION

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Dated: February 12, 2002

BEFORE THE

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SUPPLEMENTAL PETITION

Responding to a request by Green Mountain Railroad Corporation ("GMRC" or "Petitioner"), the Board issued a decision on October 18, 2001 (the "October 18 Decision") holding this proceeding in abeyance until final disposition of a case pending in the United States District Court for the District of Vermont, Green Mountain Railroad Corporation v. State of Vermont, et al., No. 1:01-cv-181 ("GMRC v. Vermont" or "District Court case").

Events since issuance of the October 18 Decision have demonstrated that continued forbearance by the Board in this proceeding will have a detrimental impact on the ability of GMRC to attract and retain business that is essential to GMRC's continued operations. GMRC accordingly is asking the Board to vacate the October 18 Decision and to entertain this Petition on the merits as promptly as is feasible.

In support of its request, GMRC attaches the Verified Statements of Jerome M. Hebda (Supplemental Exhibit No. 1; "Hebda V.S.") and William W. Schroeder (Supplemental Exhibit No. 2; "Schroeder V.S.") and respectfully shows the Board as follows.

I. PROCEDURAL BACKGROUND

On June 5, 2001, GMRC, a carrier subject to the Board's jurisdiction, filed a petition with the Board ("Petition") to institute a declaratory order proceeding pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721 for the purpose of removing uncertainty or terminating controversy. At issue was the appropriate extent of (a) Board jurisdiction and (b) preempted State and local actions under the Interstate Commerce Commission Termination Act ("ICCTA"), including 49 U.S.C. § 10501(b), with respect to the use by GMRC of its facility at Rockingham, VT, known as "Riverside".

The Petition was prompted by continuing disagreement between GMRC and other railroads with which it is affiliated, on the one hand, and various Vermont governmental bodies, including State agencies represented by the Office of the Attorney General of Vermont ("Attorney General"), on the other. GMRC intended, and still intends (1) to construct at Riverside a silo for the transloading of cement arriving by railcar into trucks for subsequent movement, (2) to construct a spur track on its property, (3) to transship bulk salt through a shed constructed for that purpose, and (4) to utilize its property for the rail-truck or truck-rail transloading of bulk and non-bulk commodities. The Attorney General had asserted that GMRC could not undertake those activities unless GMRC first complied with Vermont's environmental permitting statute, commonly known as Act 250. The State in fact had threatened GMRC with substantial civil penalties and injunctive action, citing alleged violations of Act 250 at Riverside. See Petition, Exhibit No. 5. The

State denied that there was any federal preemption of Act 250 requirements for railroads. GMRC's Petition requested the Board to address the extent to which the ICCTA preempted Act 250 and related local jurisdiction over the three areas of activity at Riverside described above.

Following its filing of the Petition, GMRC instituted the District Court case, asking the Court to declare the rights and legal relations of GMRC and the State and to conclude that "a permit under Act 250 for [GMRC's] planned or prior construction of rail facilities, is preempted by the ICCTA." The complaint also requested the Court to issue an injunction to halt the Attorney General's efforts to impose penalties on GMRC under Act 250 for GMRC's use of its Riverside facility.

Thereafter, GMRC and the State entered into a stipulation wherein the State indicated its intent to file in the Court case a Motion to Dismiss the Complaint. The parties agreed that, pending the Court's ruling on the State's Motion to Dismiss, the State would refrain from seeking civil penalties against GMRC for alleged violations of Act 250 or any permits issued thereunder, and GMRC would withdraw its request for a preliminary injunction against the State's attempts to seek such penalties. When the State filed its Motion to Dismiss, GMRC replied and simultaneously requested the Court to stay its proceedings and refer preemption issues to this Board.

On September 26, 2001, the District Court entered its Ruling on Pending Motions.[1] The Court denied GMRC's request that the judicial proceeding be stayed pending referral of issues to the Board. Also, the Court held that, "to the extent the defendants ask the Court to dismiss [GMRC's] claim that the ICCTA preempts Act 250 under all circum-

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1 The Court's Ruling was supplied to the Board by the Attorney General under cover of October 2, 2001.

stances, the motion is granted. Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA.... 49 U.S.C. § 10501 provides the STB 'exclusive' jurisdiction over the economic activities of rail carriers. In many cases, this jurisdiction can be exercised concurrent with the state's exercise of its customary police powers."

However, the Court similarly denied the State's Motion to Dismiss GMRC's complaint, holding: "* * * whether the defendant's effort to enforce one or more conditions in [an Act 250 permit previously issued jointly to GMRC and one of its customers] violates the ICCTA in this particular case requires further development of the record, either by a properly supported motion for summary judgment or after an evidentiary hearing on the merits. Therefore, to the extent defendants seek dismissal of [GMRC's] claim that Act 250 and/or the [1997 Act 250 permit] requirements are preempted in this particular case, that motion is denied."

On October 2, 2001, the Attorney General asked the Board to deny GMRC's Petition based on the Court's Ruling. On October 5, GMRC suggested to the Board that the more appropriate course of action would be for the Board to hold this proceeding in abeyance pending disposition of the District Court proceeding. In the October 18 decision, the Board pursued the course of action suggested by GMRC.

II. INTERVENING EVENTS

The Court proceeding has not progressed since the Court issued its Ruling on September 26, 2001. No procedural schedule has been ordered and no trial date has been set.

In the meantime, GMRC has lost a major customer and a major expansion prospect at Riverside due to uncertainty regarding the timing and outcome of the Act 250 permitting process. The GMRC customer that had been making cement shipments to Riverside by rail for transloading into truck -- the same customer for which GMRC intended to build the 500-ton cement silo -- decided to completely relocate its business from Riverside to a competitive railroad in New Hampshire due to uncertainty regarding the applicability and outcome of the Act 250 permitting process to the construction of a new cement transloading silo. Hebda V.S., ¶¶ 13-15. The customer desired a silo transloading facility to be available at Riverside by April-May 2002, when construction business normally picks up in the GMRC marketing area. Due to the potential length and uncertain outcome of an Act 250 permit request proceeding, GMRC could not provide the required assurance to its customer.

Act 250 requires the issuance of a permit before certain construction projects can commence. Such permits require consideration and satisfaction of 10 statutory criteria. Schroeder V.S., ¶ 6. One of those criteria requires compliance with all policies and goals in any municipal and regional plans governing the project. An applicant generally proves compliance with such municipal plans through proof of local zoning and planning approval, which requires a local zoning or planning hearing prior to satisfaction of the Act 250 criteria. Ibid. An Act 250 permit can be granted, denied, or granted with conditions, including conditions limiting truck ingress or egress at the project site. Ibid.

The Act 250 permitting process has three tiers. Permitting begins with an application filed in one of the State's District Environmental Commissions. If an applicant or a project opponent is dissatisfied with a decision made or the conditions imposed by the

District Environmental Commission, an appeal to the State's Environmental Board is available. Decisions of the Environmental Board are reviewable by the Vermont Supreme Court. Schroeder V.S., ¶ 7.

The timetable for the Act 250 permitting process varies from application to application. While the State maintains that approximately 70 percent of Act 250 permits are granted by the District Commissions in less than 60 days from filing (which does not include the time that may have been necessary to first obtain local approval under municipal plans), most projects handled in that timeframe are simplified minor amendments to existing permits. Schroeder V.S., ¶ 8. A railroad construction project would be likely to require both a pre-hearing conference and a full hearing on the merits, and would take a minimum of four to six months (exclusive of municipal zoning permits). Ibid. If an appeal is taken to the Environmental Board from the District Environmental Commission, another six to 12 months may be anticipated. A Vermont Supreme Court appeal will add a minimum of 12 more months. Schroeder V.S., ¶¶ 9 and 10.

Under optimal conditions, an Act 250 permit request for a substantial project, such as contemplated by GMRC, could be expected to take not less than 24 months, and more likely three to four years, to wend its way through all three tiers of the Act 250 permitting process. Schroeder V.S. ¶ 11. In the case of GMRC, it is possible that the Act 250 permitting process cannot presently go forward at all, due to the State's allegations that GMRC is in violation of an earlier Act 250 permit. A provision of Act 250 allows a permit application to be held in abeyance until resolution of any pending enforcement proceedings against the applicant. Schroeder V.S., ¶ 12.

The State's view that GMRC first must receive Act 250 permit approval before taking steps such as the construction of a cement silo, salt transloading facility, or spur track has received publicity in Vermont newspapers over the past several months. When GMRC was unable to provide assurance to its cement transloading customer that the silo required by that customer would be available for use by the spring of 2002, the customer terminated its relationship with GMRC effective January 1, 2002 and relocated to a railroad site in New Hampshire, a state that has no Act 250 counterpart. Hebda V.S., ¶ 15.

The loss of both present and future transloading revenue related to GMRC's departed cement customer has the potential to interfere with GMRC's continued ability to provide quality service to its customers. Hebda V.S., ¶¶ 3, 5, 16. Precisely because cement transloading revenue is so sorely needed by GMRC, GMRC actively is seeking to find a new cement transloading customer desirous of utilizing the Riverside facility or is open to the possibility the former customer back to Riverside under appropriate conditions. Ibid.

However, GMRC has learned from its unfortunate recent experience that the railroad cannot expect to maximize its business development opportunities when faced with the uncertainties and time lags attendant to the Act 250 permitting process. These uncertainties of both timing and outcome are impediments whether the business development project involves the construction of a cement silo, the construction of a spur track to handle increased business, or the use of the Riverside site for transloading, utilizing facilities such as a shed or concrete pad. Hebda V.S., ¶¶ 17, 18, 19.[2]

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[2] GMRC does not believe that mere transloading at Riverside is subject to Act 250; it is the construction of a shed or other facility, such as a concrete storage pad, that triggers Act 250.

III. THE BOARD SHOULD RESUME DELIBERATIONS IN THIS CASE

The pendency of the District Court case, GMRC v. Vermont, did not deprive the Board of jurisdiction over the instant Petition. The Board's jurisdiction to entertain the Petition under the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, and under the ICCTA, 49 U.S.C. § 721, exists independently of the Court's jurisdiction.

Contrary to the State's expressed views in this proceeding, the Board's jurisdiction to entertain and resolve the issues presented by the Petition does not require a "controversy" in the form of a State denial of an Act 250 permit or the imposition of unwelcome Act 250 conditions.[3] The APA confers discretionary jurisdiction on the Board to Act in the presence of either "uncertainty or ... controversy." The totality of the events described in the Petition and in this Supplemental Petition, as underscored by the recent loss of GMRC's cement transloading customer, clearly demonstrate the presence of controversy or uncertainty regarding the extent to which the State can apply Act 250 to the activities of GMRC. Additionally, the Board's inherent power under 49 U.S.C. § 721 to determine the reach of its jurisdiction provides a basis, either supplemental to or independent of the APA, for a substantive decision by the Board in this proceeding.

The State has argued that the Board's decision in Fletcher Granite Company, LLC -- Petition for Declaratory Order, STB Finance Docket No. 34020 (June 25, 2001) "examined a matter in an identical posture and determined that no action by the Board was warranted." Ibid. However, it is untrue that this case and Fletcher Granite occupy an "identical posture." In Fletcher Granite, the carrier sought Board intervention based solely on an apprehension of totally unexpressed local interference with the resumption

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[3] State of Vermont's Response to Green Mountain Railroad Corporation's Petition for a Declaratory Ruling, July 27, 2001, at 4-5.

of rail service over certain railroad track. The Board noted that the local government involved did not "appear to have taken any official action that would impede the resumption of rail service." While the State represents that "Vermont, like [the governmental agencies in Fletcher Granite], has not taken any official action" with respect to GMRC's use of its Riverside facilities, that is simply inaccurate. The State has notified GMRC in writing that the State intends to pursue injunctive, remedial, or civil penalty enforcement actions against GMRC for its use of the Riverside facility, stating:

> Pursuant to 10 V.S.A. Chapter 211, the office of the Attorney General has authority to seek relief for violations of Act 250, § 1259(a) and § 6616. This relief includes temporary and permanent injunctions, remediation, and civil penalties. In addition, the Vermont Supreme Court's recent decision in *In re: Appeal of Vermont Railway*, Docket No. 99-350 (December 8, 2000) makes it clear that the State may regulate facilities that are "ancillary to the operations of [a] rail line," *Id.* slip op. at 6., and in particular the operation of a salt storage shed.

Petition, Exhibit No. 5. The "salt storage shed" referred to by the State, and discussed in *In re: Appeal of Vermont Railway*, was a transloading facility operated by that railroad at Burlington, VT, in a manner similar to GMRC's present and proposed transloading activities at Riverside, including the Riverside salt transloading facility.

Moreover, GMRC alleges in the Petition that the State, acting through the Attorney General, "has asserted to GMRC that it may not construct a bulk transloading facility at Riverside, provide certain on-site storage for rail shipments, or construct additional track absent prior approval under Vermont law," Petition at 2, and the State has not disputed these claims in any of the several filings it has made with the Board in this proceeding. Unlike Fletcher Granite, this case involves official State action that would impede the continuation and expansion of rail service by GMRC.

Thus, under any view of the Board's jurisdiction to institute a declaratory order proceeding, the grounds for the exercise of that jurisdiction are present in this case. GMRC's recent loss of an essential customer at Riverside due to continuing uncertainty regarding the interplay between the ICCTA and Act 250 reinforce GMRC's belief that pre-construction permitting under that Act 250 is an impediment to business development and now impels GMRC to seek jurisdictional clarification on all available fronts, including this proceeding.

IV. THE PREEMPTION DETERMINATIONS REQUESTED BY GMRC

A. Act 250 is Preempted Totally to the Extent it is Interpreted and Applied by the State of Vermont as a Pre-Construction Permitting Process or Requirement.

It is clear from Board and judicial decisions that prior approval under State or local permitting requirements of railroad construction projects is preempted under § 10501(b) because such actions inherently interfere with railroad operations through the possible exercise of veto power over the carrier's ability to construct facilities, utilize railroad property, or conduct railroad operations. Auburn and Kent, WA -- Petition for Declaratory Order -- Burlington N. R. R. -- Stampede Pass Line, 2 S.T.B. 330, 337 (1997) ("Stampede Pass"), affirmed, City of Auburn v. STB, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) ("City of Auburn"); Village of Ridgeville Park v. New York, Susquehanna & Western Ry., 750 A.2d 57 (N.J., 2000); Borough of Riverdale -- Petition for Declaratory Order -- The New York, Susquehanna & Western Railway Corporation, STB Finance Docket No. 33466, (September 10, 1999) ("Riverdale I"); subsequent decision February 27, 2001 ("Riverdale II"); Joint Petition for Declaratory Order -- Boston & Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971,

December 22, 2000 ("Ayer I"), and the decision in the same proceeding served on May 1, 2001 ("Ayer II"). In Ayer II the Board concluded:

> Court and agency precedent interpreting the statutory preemption provisions [of Section 10501(b)] have made it clear that, under this broad preemption regime, State and local regulation cannot be used to veto or unreasonably interfere with railroad operations. Thus, State and local permitting or pre-clearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carriers the right to construct facilities or conduct operations.

When applied as a pre-construction permitting process, Act 250 inherently interferes with GMRC's operations and unreasonably burdens interstate commerce. The relevant Act 250 process is of sufficient length to substantially delay the ability of GMRC to commence projects that will maintain or upgrade its facilities. See Stampede Pass. As a pre-construction permitting mechanism, Act 250 is also preempted because it is a statute that reserves to the State the right to veto the construction of railroad facilities or unreasonably restrict their use.

GMRC's ability to handle interstate shipments and to survive as an ongoing carrier enterprise has been threatened by the actual revenue loss brought about by Act 250 uncertainties, and will be further threatened because Act 250, as applied by the State, impedes the ability of GMRC to compete with railroads in neighboring states, including New Hampshire, where railroad construction need not be preceded by a state environmental permit. GMRC's experience with Act 250 unfortunately illustrates the very evil that Congress intended to prevent -- the "balkanization" of economic standards to govern the operation of railroads and rail systems in the United States. See ICCTA legislative history, Petition at 19-20.

GMRC does not require additional authority from the Board to construct a cement silo for rail transloading purposes at Riverside, to construct a spur track at Riverside, to construct a shed to transload and hold rail-delivered bulk salt, or to construct other facilities for the transloading of interstate rail shipments. The use of GMRC's railroad property for these railroad purposes falls squarely within the definitions of "railroad" and "transportation" that are subject to the Board's jurisdiction under 49 U.S.C. §§ 10102(6) and (9), even though new authority to build or use such facilities is rendered unnecessary by 49 U.S.C. § 10906. Despite the absence of a jurisdictional need by GMRC to obtain additional Board authority for these undertakings, the preemption provisions of § 10501(b) control. Friends of the Aquifer, City of Hauser, ID, et al., STB Finance Docket No. 33966 (August 10, 2001), and cases cited therein.

Each of the activities being conducted, or proposed to be conducted, by GMRC is an integral part of GMRC's interstate operations at Riverside. Transloading is the lifeblood of GMRC's service structure. The construction and use of a cement silo for the transfer of bulk cement from rail to truck, the use of a shed to facilitate salt transloading, and the use of ground or shed storage for non-bulk commodities as an intermediate process between rail and truck movement are indispensable aspects of the service which GMRC must offer to attract and retain this traffic. A spur track aimed at expanding and facilitating rail-truck transshipping operations similarly is integral to GMRC's interstate rail service. GMRC's customers request GMRC to provide transshipping facilities, GMRC responds to those requests through binding and lawful rate quotations, and GMRC must take these steps in order to compete effectively with surrounding railroads.

To the extent Act 250 functions as a permitting process purporting to require GMRC to obtain prior approval for the conduct of these essential railroad functions, the Board should find that Act 250 is preempted. However, GMRC recognizes that not all State or local regulations, or environmental laws, affecting GMRC's rail operations necessarily are preempted in all circumstances. As stated in Friends of the Aquifer, supra:

> * * * communities can enforce their local codes for electrical, building, fire, and plumbing unless the codes are applied in a discriminatory manner, unreasonably restrict the railroad from conducting its operations, or unreasonably burden interstate commerce. Moreover, railroads may not deny towns access in emergencies and for reasonable inspection of the railroad facilities. And to the extent a railroad is willing to undertake an activity or restriction, the activity or restriction generally should be seen as reflecting the carrier's own determination that the condition is reasonable and will not unduly interfere with interstate commerce.

GMRC has acknowledged its willingness to cooperate extensively with local authorities and to comply with local code requirements such as those governing electrical wiring. Hebda V.S. ¶¶ 23-25. GMRC also recognizes that it is subject to appropriate State enforcement of Federal environmental statutes. If disagreements arise between GMRC and governmental bodies regarding the application of State or local regulations to GMRC's operations, including truck access to Riverside, GMRC will act promptly to obtain resolution of those disputes should they fail to be resolved amicably.

B. Act 250 Should Not Be Applied to Curtail GMRC's Present Use Of Riverside

As detailed in the Hebda V.S., ¶¶ 7-8, the State seeks to curtail GMRC's use of its Riverdale facility within 100 feet of the Connecticut River based on the allegation that such use is in violation of the "dash-2" Act 250 permit issued in 1997 jointly to GMRC and PMI Lumber Transfer, Inc. ("PMI"), a non-carrier. The State has taken the position

that the dash-2 permit constitutes a voluntary agreement between GMRC and the State and thus is enforceable in court.[4] GMRC disagrees with the State.

First, GMRC is not bound by the dash-2 permit because that permit was sought by and issued to GMRC jointly with a non-railroad joint venturer, PMI, which withdrew from Riverside shortly after the permit was issued. Activities conducted by a non-carrier such as PMI should be distinguished from rail carrier operations and may not qualify for preemptive treatment under § 10501(b). Cf. Florida East Coast Ry. Co. v. City of West Palm Beach, 110 F. Supp. 2d 1367 (S. D. Fla. 2000). When PMI withdrew from Riverside, and transloading activities at Riverside were conducted solely by GMRC, the Board's exclusive preemptive jurisdiction attached to GMRC's operations.

Second, even assuming, arguendo, that the dash-2 permit use restrictions remained valid subsequent to withdrawal of PMI from the project, conditions at Riverside differ now from when the dash-2 permit was issued, and enforcement of the buffer zone condition would be an unreasonable burden on GMRC and interstate commerce. Increased business handled by GMRC at Riverside now requires substantially more ground storage capacity than in 1997, and that capacity is not available to GMRC if access to the land within the 100-foot buffer zone is prohibited. If GMRC is unable to utilize land within the 100-foot zone, its interstate transloading activities at Riverside will be curtailed sharply and GMRC will lose essential revenues from rail service.

Third, curtailment of GMRC's ability to furnish non-bulk transloading services will interfere with GMRC's right to operate its lines and to provide adequate facilities for its traffic, an undesirable consequence observed by the Board in Riverdale I, n. 15. As

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[4] State of Vermont's Response to Green Mountain Railroad Corporation's Petition for a Declaratory Ruling, July 27, 2001, at 10.

explained in the Petition at pp. 16-17, GMRC's non-bulk transloading services, utilizing part of its property within the area the State would proscribe, is a lawful response by GMRC to its customers' requests for service. Those GMRC activities responsive to customer requests for transportation service fall wholly within the Board's exclusive jurisdiction. Efforts by the State to preclude the use of GMRC's railroad property for these lawful purposes should be found preempted as an inherent interference with the lawful exercise of GMRC's franchise and obligations.

In any event, GMRC rejects the State's contention that its acceptance of the dash-2 permit constitutes an "agreement" of the type upheld by the STB in Town of Woodbridge, NJ v. Consolidated Rail Corp., STB Docket No. 42053 (March 22, 2001).

Finally, the Board should conclude that GMRC does not need an Act 250 permit to construct and operate a shed for the transloading and related storage of bulk salt. As explained in the Petition, at 8-9, the salt transloading shed presently in use at Riverside was constructed without an Act 250 permit. The State regards that act as a punishable violation of Act 250. The Board should find that an Act 250 permit was and remains unnecessary for the construction and use of that facility in the unloading and distribution of bulk salt arriving at Riverside via rail and departing via truck.

V. CONCLUSION

For the foregoing reasons, the Board should resume consideration of the issues raised in this proceeding and issue a declaratory order clarifying the extent of federal pre-emption of the Act 250 provisions the State seeks to apply to GMRC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served by first-class mail, postage prepaid, this 12th day of February, 2002, on all persons, entities, and government agencies listed below.

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Supplemental Exhibit No. 1

VERIFIED STATEMENT

OF

JEROME M. HEBDA

1. My name is Jerome M. Hebda. I am President of Green Mountain Railroad Corporation ("GMRC").

2. GMRC is a Class III railroad that operates 52 miles of track between Rutland, VT and Cold River, NH, as shown on the map attached as Exhibit 1 to the June 5, 2001 Petition for Declaratory Order in this proceeding ("Petition"). GMRC connects with the nation's railroads through interchanges with New England Central Railroad and Springfield Terminal Railway Company at Bellows Falls, VT and with Vermont Railway, Inc. ("VTR") at Rutland. GMRC is operated under common control with VTR and its affiliated railroads.

3. GMRC primarily operates as an interstate freight railroad, although it derives approximately 10 percent of its revenue from passenger excursion operations. The carrier is financially marginal, having experienced losses of approximately $10,000 in 2000 and $200,000 in 2001 following profits in prior years.

4. GMRC determined some six years ago to attempt an aggressive expansion of its traffic and revenue. It acquired approximately 62 acres of land to add to a site on its railroad north of Bellows Falls known as Riverside and set about to develop new business to be handled through that facility. A map of the Riverside facility is attached as Exhibit No. 2 to the Petition.

5. Because the northern New England area served by GMRC is not heavily industrialized, about two-thirds of the non-overhead rail business handled by GMRC is terminating traffic. GMRC accordingly concentrated its business development efforts on new business that could arrive at Riverside by rail. Its efforts were modestly successful. In 1997, GMRC originated and terminated 416 carloads at Riverside. By 2000, that business had nearly doubled, to 798 carloads. In 2001, Riverside traffic amounted to 1,421 cars, or 52 percent of all originating or terminating GMRC carloads, and produced approximately $500,000 in revenue, or about 20 percent of total GMRC freight revenues.

6. The market served by GMRC consists largely of transshipping industries; that is, industries that do not consume or process rail shipments at rail-served sites, but rely on trucks to move goods to or from the rail site. Examples of out-of-state traffic generated by such industries are bulk highway salt, which arrives by rail and is stored or accumulated at rail-side and distributed by truck; and construction materials, bulk or otherwise, which arrive by rail, are stored at rail-side, and are delivered by truck. These types of activities, which in fact are conducted at Riverside, require a facility with rail access, storage capacity for the product after rail shipment, and extensive truck access within the property. Riverside is GMRC's only site with sufficient area to accommodate these needs on a growth basis.

7. As indicated at page 2 of the Petition, in 1997, GMRC and a then-tenant at Riverside, PMI Lumber Transfer, Inc. ("PMI"), a non-carrier, obtained Land Use Permit No. 2W0038-2 (the "dash-2 permit") from the State pursuant to its environmental permitting statute, commonly known as Act 250. A copy of the dash-2 permit is attached to the Petition as Exhibit No. 3. That permit authorized the construction "of an office building

approximately 20 feet by 30 feet for up to five employees and the operation of a forest products distribution yard using rail and trucks," subject to certain conditions. One such condition was that the "permitees shall maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation between the top of the bank of the Connecticut River and any disturbed areas" on the Riverside property.

8. PMI withdrew from Riverside in 1998. Thereafter, GMRC utilized the Riverside site for transloading activities unrelated to PMI or to "forest products," sometimes utilizing property within the 100-foot buffer zone described in the dash-2 permit. GMRC's transloading activities are described at pages 4-10 of the Petition. Were GMRC to be deprived of its ability to continue with those transloading activities, it would lose the majority of the revenues it derives from its use of the Riverside facility. That revenue loss could well be fatal to both the Riverside facility and GMRC itself, especially now that GMRC has experienced the loss of its cement transloading customer at Riverside for reasons related to Act 250, as explained later in this statement.

9. GMRC cannot compete effectively without offering prompt assurance of transloading services, sometimes accompanied by the provision of limited storage, to prospective customers. GMRC faces competition from truck-rail reload facilities at Westfield and Palmer, MA, Charlestown and West Lebanon, NH, and Island Pond, VT. These competitive locations are not a great distance from Riverside, so that rail shipments which terminate at these points can be trucked into the GMRC market area served from Riverside.

10. As outlined in the Petition, the State of Vermont has asserted that the construction and use of rail facilities at Riverside, including transloading facilities and siding

track, require prior approval from State environmental agencies pursuant to Act 250. According to a November 2000 pamphlet entitled "Act 250 -- A Guide to Vermont's Land Use Law" issued by the State of Vermont Environmental Board, Act 250 requires preconstruction permits where construction is to take place for commercial or industrial purposes on a site that is more than 10 acres (or less in towns without permanent zoning and subdivision regulations). According to the same pamphlet, Act 250 applies to "railways" and takes a number of criteria into account, including scenic and natural beauty, aesthetics, highway congestion, and growth impacts. The State's pamphlet asserts that about 70 percent of Act 250 permits are issued in less than 60 days, but acknowledges that "more complex projects, in particular, may take longer." An Act 250 permit decision can be appealed from the District Environmental Commission (a regional board) to the State Environmental Board and, from there, to the Vermont Supreme Court, if necessary. Act 250's application and procedures are described in more detail in the contemporaneous Verified Statement of William W. Schroeder, identified as Supplemental Exhibit No. 2.

11. In June 2001, when GMRC petitioned the Board to institute a declaratory order proceeding, GMRC requested the Board to consider Act 250 issues in the context of four GMRC undertakings at Riverside: (1) a transloading facility for handling bulk cement through a 500-ton silo to be constructed on the railroad's property, (2) the construction of a salt transloading and storage shed which the State views as having been built in violation of Act 250 due to lack of a permit, (3) the construction of a new spur track, approximately 1,000 feet in length, likewise on the Riverside site, and (4) the existing use of the site to transload non-bulk shipments between rail and truck, a process utilizing ground or shed storage of the goods between the rail and truck segments, alleged by

the State to violate the previously issued dash-2 permit that purported to establish a 100-foot use-free buffer zone along the banks of the Connecticut River.

12. In Green Mountain Railroad Corporation v. State of Vermont et al, pending in the United States District Court for the District of Vermont, GMRC requested the district court to issue a declaratory judgment regarding the same four issues described in the foregoing paragraph. Subsequently, GMRC requested the court to refer those issues to the Board. On September 26, 2001, the court issued a decision declining the request for referral of issues to the STB and stating that the court would decide the case on the record before it. Thereafter, in response to a request by the State that the Board deny the Petition before the board based on the court's September 26 decision, GMRC requested the Board to hold the Petition in abeyance pending a decision on the merits by the court. The Board entered an Order doing so on October 18, 2001.

13. Recent events have demonstrated to GMRC that it now must pursue the Petition to a conclusion. Because of the uncertainty surrounding the application of Act 250 to GMRC's operations at Riverside, the customer that was making bulk cement transload shipments by rail, and that desired to improve the efficiency of that process by utilizing the 500-ton cement silo that GMRC proposed to construct, determined to remove its business from Riverside and to relocate at a new, competitive rail site located at West Lebanon, NH.

14. The cement silo that GMRC proposed to construct for use by its transloading customer, and that it now hopes to construct for use by another customer, is described in the Petition. It has a 500-ton capacity, or the equivalent of five rail cars, and approaches 100 feet in height. Rail cars would be unloaded as at present; that is, utilizing

gravity unload, assisted by mechanical vibrators to completely empty the cars, with the dry cement transferred to the silo by conveyor belt. Once in the silo, the cement can be transferred to trucks by the truck operators. This is an attractive alternative which will allow trucks to be loaded before dawn if necessary and start enroute to batch mixing plants where cement can be prepared for job site use early in the work day. GMRC expects that the construction of a 500-ton cement silo will increase GMRC's rail business by approximately 100 cars annually over business levels without a silo. These 100 rail cars will generate approximately 450 additional truckloads of cement annually. If predawn rail car unloading proves to be unduly noisy and disturbing to residents of the Riverside area, GMRC is prepared to employ techniques, such as sound barriers, to defuse noise dissemination.

15. GMRC learned recently from its cement transloading customer that the customer was becoming upset by the inability of GMRC to provide firm assurance that the new, 500-ton cement silo for rail-truck transloading definitely would be constructed at Riverside. The customer desired firm assurances that a silo would be available for its use by the commencement of the spring construction season, which normally begins in the Riverside market area sometime between April 1 and May 1, depending on weather conditions. GMRC looked into the possibility of utilizing a smaller, temporary cement silo which would provide certain efficiencies for the customer pending resolution of Act 250 issues and related litigation regarding the construction of the larger silo. However, we were informed by counsel that even the construction of a smaller silo, nearly 75 feet high, would be regarded by the State as requiring prior approval under Act 250. GMRC could provide its customer with no firm, reliable assurance that such approval would be

forthcoming by early spring, given that there is no assurance that the Act 250 process, including any possible appeals within that process, can be completed in a few months or will result in a permit that allows a sufficient number of cement trucks to enter and exit the Riverside site consistent with the customer's needs and the efficient operation of the transloading facility. Because of this uncertainty, GMRC's customer notified GMRC that, effective January 1, 2002, the customer would relocate to a site served by a competitive railroad, Claremont Concord Railroad Corporation, at West Lebanon, New Hampshire.

16. The loss of this customer will reduce GMRC's present rail revenues by approximately $180,000 per year, absent a replacement customer. Additionally, if, as a result of losing this customer, GMRC is not able to attract a replacement customer interested in making shipments of sufficient volume to justify the construction of a 500-ton cement silo, GMRC's potential revenue loss will be far greater, easily amounting to over $250,000 annually, a setback that may curtail GMRC's ability to provide quality service to its customers. Precisely because this existing and potential new revenue is so sorely needed by GMRC, GMRC a new cement transloading customer that will utilize the Riverside facility. We have even maintained a dialogue with our former customer in case it becomes dissatisfied with its new arrangements at West Lebanon and desires to return to Riverside.

17. I am primarily responsible for business development on GMRC and largely responsible for business development on its affiliated carrier, VTR. I believe that there remains a viable market opportunity for a cement transloader at Riverside, but I am concerned that our efforts to attract such a customer will continue to be hampered be-

cause of uncertainty generated by the Act 250 process. Each time a business expansion opportunity for Riverside arises, the opportunity may be lost if GMRC cannot make a firm commitment until the Act 250 process is completed.

18. The State's insistence that GMRC subject itself to Act 250, as interpreted by the State, places GMRC at a distinct disadvantage to competitive railroads located in neighboring states, where Act 250 is not part of the law. An example of that lies in the loss of GMRC's cement transloading customer to a railroad establishing a similar facility in New Hampshire, where there is no Act 250 counterpart. GMRC's departing customer advised me that the New Hampshire carrier was able to make an unequivocal commitment to commence service in the Spring of 2002, which is not something that GMRC could do in the face of Act 250 and the possibility of a multi-year appeal under that statute. I do not believe that GMRC can compete effectively against railroads that operate in other states where pre-construction environmental permitting is not required, and held that view even before our cement transloading customer withdrew from Riverside on January 1 of this year.

19. These considerations also apply with respect to the construction of the 1000-foot spur track at Riverside, to the construction and use of GMRC's Riverside salt transloading and storage facility, and to transloading activities for non-bulk shipments that have been questioned by the State. As our customers become aware of the possibility that the State may seek to bar the use of Riverside for certain existing or future transloading activities, or may impose unacceptable conditions or limitations on those activities, we run the risk of losing those customers. Additionally, construction of the proposed spur track, as described in the Petition, is intended and needed to enhance the op-

erational flexibility of GMRC, providing new trackage on which to hold cars awaiting loading or unloading in an area of the site that provides direct access to land that is available for ground storage of commodities, as shown on Exhibit No. 2 to the Petition. In some cases, transloading activities at Riverside may require the use and construction of either concrete pads or sheds to protect commodities from weather conditions. Extensive truck access throughout the site is necessary for a transloading facility to function efficiency. Substantial limits on truck ingress or egress at Riverside will curtail the utility of the site; customers may take their business to competitive points that do not regulate truck flow, or the limited storage areas available may become congested with goods awaiting truck movement.

20. The State's letter of March 13, 2001 (Petition, Exhibit No. 5) accuses GMRC of constructing a salt storage shed without an Act 250 permit. That facility should more accurately be described as a salt transloading and storage shed, as explained at pp. 8-9 of the Petition. When bulk road salt arrives by rail car, the salt is conveyed into the shed and either loaded into trucks immediately or held for subsequent loading, depending on weather conditions and the level of salt supply on hand.

21. GMRC's transloading of non-bulk commodities at Riverside is described accurately at pages 5-7 of the Petition. As discussed in the Petition, the State takes the position that GMRC cannot use any of the land at Riverside that is within 100 feet of the Connecticut River because such use allegedly is prohibited by the dash-2 permit, issued jointly to GMRC and PMI. PMI ceased being a tenant at Riverside in 1998. Our attorneys take the position that the Board's jurisdiction may apply differently to a joint venture

construction project between a railroad and a non-carrier than to the use of rail facilities by a railroad acting alone.

22. In any event, the circumstances now faced by GMRC are not the same as those we faced in 1997, when PMI and GMRC jointly sought Act 250 authority to construct an office building and forest products distribution yard at Riverside. The expansion of GMRC's Riverside business since that time requires that GMRC utilize its property more extensively than appeared to be necessary in 1997. Ground storage of goods that have arrived by rail and await removal by truck, or which arrive by truck and await loading into rail cars, is an essential part of our business and requires more land as the business grows. Our customers have requested rate quotations from GMRC that include transloading and temporary storage of goods between rail and truck shipment, and GMRC has provided such rates in order to attract and retain the business. A sample of such a rate quotation is described at page 6 of the Petition. Moreover, storage areas must be interspersed with passageways for vehicular access and must be situated as closely as possible to rail tracks in order to minimize the distance and time consumed in the removal of shipments from railcars and the loading of shipments into railcars. Many of the commodities handled in this manner are large and bulky, such as 60-foot lengths of pipe or sections of piling or rebar, and require the use of specialized lifting devices that resemble large tractors with oversize wheels, on which a spreader beam is mounted. These vehicles require a network of passageways. Electric service is needed at the site to provide electric power and illumination during short days. Depriving GMRC of the use of all land at Riverside within 100 feet of the Connecticut River would not only bring business growth to a standstill, but limit GMRC's ability to handle existing business.

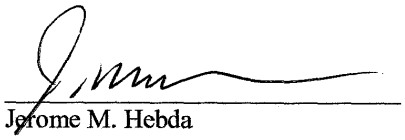
23. Although GMRC resists the State's claim that pre-construction permitting under Act 250 is required before we can undertake such steps as the construction of a transload facility or a new spur track, GMRC recognizes the legitimate concern of local government for the health, safety, and welfare of Vermont's citizens. As a good Vermont neighbor, and as a carrier subject to the Board's jurisdiction and aware that the Board encourages cooperative efforts between carriers and communities regarding the use of rail facilities, GMRC has made sincere efforts to resolve its differences with the State's representatives. Our attorneys have attempted to negotiate with the State the adoption of procedures to provide affected Vermont communities with notice of GMRC's construction plans and an opportunity for the communities to express their views concerning those plans, including assertions of local jurisdiction, so long as GMRC is not required to engage in pre-construction permitting under Act 250. The State's response, made through the office of Vermont's Attorney General, has been to inform GMRC's counsel that the State will not relinquish its position that Act 250 requires GMRC to undertake pre-construction permitting in each instance.

24. GMRC reiterates its intent to fully inform local communities of the railroad's construction plans and plans for the use of GMRC's railroad facilities even if the Board determines that Vermont's pre-construction permitting process is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). GMRC recognizes that, under Board decisions, GMRC is expected to satisfy local construction ordinances, such as those applicable to electrical wiring and sewer connections, to the extent that local ordinances do not unreasonably interfere with GMRC's railroad activities. GMRC also recognizes that the State may enforce federal environmental laws and hold GMRC re-

sponsible if it violates those laws. As explained in the Petition, GMRC has already undertaken remediation where local environmental violations have come to its attention.

25. If the ICCTA is held to preempt the pre-construction permitting requirements of Act 250, GMRC will not walk away from its obligations as a good citizen of the State of Vermont. It will continue to provide on-going notice of transportation construction projects, and is confident that it will be able to resolve any concerns of local government that arise in connection with those projects. Prior to any construction for railroad transportation purposes, GMRC commits to provide, no later than 30 days before commencing construction, copies of any applicable plans to the local planning commission, the regional planning commission, the district environmental commission, the State agency of transportation, the State agency of natural resources, and the State fire marshal. GMRC also commits to make a good faith effort to address any concerns raised if it can do so without unduly restricting its operations. GMRC also shall undertake that any construction project for railroad purposes will comply with applicable (a) federal environmental laws, (b) State waste management law [10 V.S.A. 6601, et seq.] and (c) electrical, plumbing, or other building code or health requirements. What GMRC cannot do is accept the State's position that Act 250 trumps federal law, or compete effectively with railroads in nearby states if those railroads are relatively unencumbered in their ability to attract business in comparison with pre-permitting requirements alleged by the State to apply under Act 250.

I, Jerome M. Hebda, declare under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.



Jerome M. Hebda

Supplemental Exhibit No. 2

VERIFIED STATEMENT

OF

WILLIAM W. SCHROEDER

1. My name is William W. Schroeder. I am a lawyer in the Burlington, Vermont office of the law firm of Downs Rachlin Martin PLLC. I have been a member of the Vermont bar since 1981. My practice focuses partly on Vermont land use law, which includes the Vermont environmental statutes commonly known as Act 250.

2. In this statement, I describe the scope of Act 250, Act 250 permitting procedures, and Act 250 appellate procedures as I deem those issues applicable to the Petition of Green Mountain Railroad Corporation ("GMRC") for a declaratory order. Unless the text of my statement indicates otherwise, I endeavor to describe Act 250 without consideration of arguments that its provisions may be preempted by the provisions of the Interstate Commerce Commission Termination Act ("ICCTA").

3. Act 250 became law in 1970. It has since been amended and my description of its provisions reflects the Act as amended. The provisions of Act 250 can be found at 10 V.S.A. § 6001 et seq.

4. Act 250 is a land use and environmental statute. When it was passed, the Vermont Legislature declared that "It is necessary to regulate and control the utilization and usages of lands and the environment to insure that, hereafter, the only usages which will be permitted are not unduly detrimental to the environment, will promote the general welfare through orderly growth and development and are suitable to the demands and needs of the people of this State." Findings and Declarations of Intent, Vermont Land Use and Development Law, Title 10, Chapter 151.

5. Act 250 generally applies to construction for commercial or industrial purposes on a site of more than ten acres owned or controlled by a person (except for farming or forestry), or on more than one acre if the site is located in a municipality that does not have both permanent zoning and subdivision bylaws. The Riverside site of GMRC is more than ten acres.

6. Act 250 contains 10 criteria which must be satisfied prior to the issuance of an Act 250 permit. These "Criteria" address the following issues:

A. Water and air pollution.

B. Water supply.

C. Impact on existing water supplies.

D. Soil erosion.

E. Traffic congestion and safety. This Criterion applies to both rail and truck traffic, including highway traffic volumes, and requires a finding that the project will not cause unreasonable congestion or unsafe conditions. A permit cannot be denied under this criterion, but can be conditioned (e.g., a limit placed on the hours during which the rail facility can be operated or on the number of trucks, and therefore the volume, that can enter or leave the facility).

F. Educational services.

G. Municipal or government services.

H. Scenic and natural beauty, aesthetics, natural areas, historic sites.

I. Conformance with capability and development plan, consisting of Subcriteria (A) through (L). Subcriterion 9(A) requires a finding that local government has the financial capacity to accommodate growth, caused by the project and otherwise expected, without undue burden from the project. In other words, if the project imposes a net financial

burden on a municipality, either directly or indirectly, it may be denied a permit under Criterion 9(A). Transportation projects have been denied under this Subcriterion because they have the potential to cause secondary growth which may not pay its fair share for municipal services. Subcriterion 9(K) requires a finding that development affecting traffic on a nearby highway will not unreasonably endanger public investment in the highway or materially jeopardize or interfere with the function, efficiency or safety of, or the public's use or enjoyment of the highway. A permit can be denied under this Subcriterion for a project that causes congestion or safety problems on nearby highways.

J. Local and regional plans. Criterion 10 requires compliance with all the policies and goals in the municipal and regional plans governing the project. An applicant generally proves compliance with the municipal plans through local zoning and planning approval.

I have noted the Act 250 Criteria and Subcriteria under which a railroad project is most likely to receive scrutiny. Other Criteria and Subcriteria protecting natural resources such as wetlands, water resources, historic and archeological sites, and primary and secondary agricultural soils, may also apply to a transportation project.

7. The Act 250 permitting process has three tiers. Permitting begins with an application filed with one of the State's nine District Environmental Commissions. If an applicant or a project opponent is dissatisfied with the decision made or the conditions imposed by the District Environmental Commission, an appeal to the State's Environmental Board is available. Decisions of the Environmental Board are reviewable by the Vermont Supreme Court.

8. The timetable for this process varies from application to application. The State maintains that approximately 70% of Act 250 permits are issued by the District Commissions in

less than 60 days from filing. Most of these projects are approved under a simplified minor amendment or administrative amendment procedure. The State also acknowledges that more complex projects may take longer to complete. A railroad construction project, such as a cement silo with its attendant increase in truck traffic, is likely to require both a pre-hearing conference and full merits hearing, and will take a minimum of four to six months. Any project to which there is any competent opposition will also receive full review.

9. Act 250 provides that an appeal to the Environmental Board from the District Environmental Commission decision may be taken in 30 days. Environmental Board procedures then provide for a de novo review of the issues under appeal, based on prefiled written testimony. It has been my experience that an Environmental Board appeal consumes between 6 and 12 months in a typical case, from filing to decision.

10. If an appeal from the Environmental Board to the Vermont Supreme Court is necessary, my own personal experience, and that of our firm, which regularly litigates before the Vermont Supreme Court, is that a minimum of 12 months is likely to expire between the date when the Environmental Board issues its decision and the date when the Supreme Court issues a decision responding to the appeal. Many cases, of course, take longer.

11. Under optimal conditions, an Act 250 permit request for a substantial project that is considered at the District Environmental Commission, Environmental Board, and Supreme Court tiers of the Act 250 process can be expected to take not less than 24 months. The more likely timeframe for such a contested case is three to four years.

12. The timetables for Act 250 proceedings and, especially for the processing of Act 250 permit requests before the District Environmental Commission, may be altered substantially where, as in the case of GMRC, the applicant is alleged to be in violation of a previously issued

Act 250 permit. A 2001 amendment to Act 250 provides, in essence, that the processing of any Act 250 permit application may be held in abeyance until resolution of any pending enforcement proceedings against the applicant involving alleged violations of Act 250 permits. 10 V.S.A. § 6083(g). As explained in GMRC's Petition filed with the Board on June 5, 2001, the State is alleging exactly such violations by GMRC, and it is not possible to determine, therefore, that GMRC could process an Act 250 permit application before a District Environmental Commission until the State's claims against GMRC have been resolved.

I. William W. Schroeder, declare under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

William W. Schroeder

William W. Schroeder

Dated: January 30, 2002

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